MEMORANDUM OF LAW

DATE: October 15, 1992

TO: Councilmember Bob Filner

FROM: City Attorney

SUBJECT: Potential Liability of the Federal Government for Tijuana River Valley Sewage

By means of a recent memo, you describe the fifty year history of renegade sewage flows from Tijuana, Mexico that have continuously threatened the public health and environment of the United States and especially the South Bay. Based on this obvious problem, you asked for our thoughts on the City's ability to sue the federal government for clean-up costs.

As you can appreciate, this presents significant questions of both international and domestic law which are best left for another venue. We offer here our best thoughts for both the legal and practical approach to solving this problem.

You are quite correct that transboundary pollution from Tijuana has plagued this area for fifty (50) years. As early as 1954, the Governor of California urged the U.S. State Department to file a formal protest over transboundary sewage. Some relief was offered in 1966 with completion of the "emergency connection," allowing a system to divert Mexican sewage to Point Loma for treatment and disposal. Although meant for "emergency" use, the system was used regularly, causing the federal government to explore various solutions ranging from "return-to-sender" to a joint international treatment plant. (Although originally rejected by Mexico in 1985, the international treatment plant is now being designed as an initial 25 mgd plant and is expected to be completed in 1996.)

1. ACTION AGAINST THE FEDERAL GOVERNMENT

The potential liability of these flows was faced by this office in 1988 with the filing of U.S.A. v. City of San Diego, Case No. 88-1101-B, in the United States District Court for Southern California. Although designed to compel secondary treatment at Point Loma, the case also sought monetary damages for failure to be at secondary treatment and monetary damages for thousands of alleged spills from 1983 through 1988.

In analyzing possible defenses against this suit, this office thoroughly reviewed the potential for filing a counter-claim for damages against the federal government under the Federal Rules of Civil Procedure, Rule 13(b). A counterclaim is appropriate where any claim exists against an opposing party and that claim did not arise out of the same transaction that is the subject matter of the underlying action. Such possible claims include:

1. Public Nuisance: Interference with a public right caused by a party.
2. Trespass: Intrusion of a protected interest by matter caused by another.
3. Negligence: Breach of a duty of care by another that caused injury.

Each of these theories posed substantive and procedural hurdles stemming from the fact that the offending sewage was not created (caused) by the United States but rather was a product of Mexico. Hence it could be argued that the proper defendant is Mexico and not the United States.

Undaunted by the problems, this office asserted the federal responsibility by way of an equitable setoff, i.e., that any damages likely to be assessed to the City in favor of the United States should be diminished (setoff) because of federal respon-sibility for border sewage. Hence the answer in U.S.A. v. City asserted:

ELEVENTH AFFIRMATIVE DEFENSE
(Equitable Setoff)

54. The Republic of Mexico has discharged and is likely to continue to discharge pollutants, as that term is defined under the Clean Water Act,including raw sewage, into the Tijuana River. The Tijuana River flows from the Republic of Mexico into theTijuana Saltwater Estuary in the United States of America. The Tijuana Saltwater Estuary is located within the general geographic area served by the City of San Diego's wastewater treatment and collection system. The City has taken action and has incurred costs, and is likely to continue to take action and incur costs, to prevent these discharges from entering the Estuary and other

> areas within the San Diego wastewater treatment and collection system. These ongoing discharges, and the efforts to control them, have affected and will continue to affect the City's ability to design wastewater treatment facilities necessary to achieve compliance with the Clean Water Act.
>
> The actions undertaken and costs incurred by the City of San Diego to address these discharges are the responsibility of the United States of America pursuant to applicable federal law and treaties. The City is therefore entitled to an offset for its costs to the extent that such costs were incurred to take actions that were otherwise the responsibility of the United States of America.

City of San Diego Answer in U.S.A. v. City, No. 88-1101 filed on May 15, 1989

While evidence was presented on the border sewage issue, Judge Brewster was not convinced that a monetary setoff was appropriate and hence did not award any such relief in his Memorandum Decision of April 18, 1991. However, after the setoff defense was filed, the federal government admitted some responsibility for transboundary sewage.

> WHEREAS, the parties to this agreement, recognizing that transboundary sewage flows constitute an international problem, the solution of which is a federal responsibility, wish to combine their efforts to achieve said solution
>
> . . . .

Memorandum of Agreement Among the City, State, United States and I.B.W.C. Relating to the Solution of the Problems Created by Transboundary Flows of Sewage from Tijuana, Mexico, Document No. RR-272564 dated December 12, 1988 ┌emphasis addedσ.

Although this admission is in a recital and recitals are not technically part of a contract, we think this admission is confirmed by the Memorandum of Agreement between the United

States and the City, Document No. RR-278361 dated July 22, 1991, whereby the United States agreed to pay treatment costs and provide for diversion of Tijuana sewage up to 13 mgd through the emergency connection.

While we believe these two (2) agreements substantially establish federal responsibility for transboundary sewage, any independent action for damages based on the previously described theories of nuisance, trespass or negligence can be expected to be vigorously contested. The defense argument no doubt would be that this is an international problem and that the U.S.- Mexico Treaties of 1944 and 1983 and the International Boundary and Water Commission Minutes No. 270 and 283 committing to build an international treatment plant all constitute reasonable conduct in eliminating transborder pollution.

Hence as both a legal and practical matter, an independent action against the federal government for transborder pollution presents a problematical undertaking. With the already diminished legal resources in this office, supplemental resources for staffing and discovery would have to be authorized to pursue such an independent action.

For the present, the City has the Memorandum of Agreement as amended on July 21, 1992 for treatment of Tijuana sewage. This expires on January 21, 1993. Hence the City has the leverage to insist on full payment for acceptance of Tijuana sewage. Should this agreement not be funded by the United States, then the relief based on the theories of nuisance, trespass and negligence could be authorized by Council.

2. ACTION AGAINST THE REPUBLIC OF MEXICO

In addition to an action against the U.S., the same theories of nuisance, trespass and negligence could be pursued against Mexico. The pitfalls of such a course of action have been thoroughly reviewed in Transboundary Pollution from Mexico: Is Judicial Relief Provided by International Principles of Tort Law?, 10 Houston J. of International Law 105, 116 (1987), where the author concludes:

> B. Direct Action by Private Citizens or California Officials in United States Court
>
> The best chance for resolution of the sewage pollution problem may be to file suit against Mexico in a U.S. court applying international tort principles and invoking the tort exception to the FSIA. This exception requires a find-ing that the foreign state violated some duty.
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> As discussed previously, the Helsinki

Rules, Stockholm Principles and the Trail Smelter arbitration establish that foreign states have a duty to avoid or remedy transboundary pollution. The following section discusses common law remedies available in a private action, procedural issues relevant to a suit against a foreign nation, and immunity defenses available to Mexico.

Of course, service of process upon a foreign state such as Mexico is accomplished by letters rogatory which must be translated from English to Spanish and presented to Mexican officials from the Mexican district court. Obviously such an undertaking would require a significant staffing commitment as well as foreign counsel to assist in obtaining jurisdiction.

3. CONCLUSION

The federal government faces potential liability for trans-boundary pollution under theories of nuisance, trespass and negligence. However, the chances of success on such theories are diminished since the sewage on the border is not generated by the United States and the federal government could argue reasonable conduct in attempting to alleviate the problem. Absent a substantial commitment of resources to name both the United States and Mexico as defendants in claims for relief, the best practical solution remains to negotiate a continuation of the agreement for the federal government to compensate San Diego for the treatment of Tijuana sewage.

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